prove an exception, so it is for him to prove the breach of a condition of which would relieve him from liability in respect of a particular loss."

On the evidence, the learned Judge held that the appellant had failed to discharge that burden. We see no reason to differ from his view.

Ground 5 is concerned mainly with hearsay evidence. The appellant submitted that the learned Judge's view that the evidence of D.W.1 was hearsay was clearly erroneous. What P.W.1 and P.W.2 said to D.W.1 could not be hearsay. To support this proposition *Woodroffe and Ameer Ali*, 13th Edition, page 1490, *Sarkar's* Laws of Evidence, 11th Edition, page 179 and *Stiles* v. *The Cardiff Steam Navigation Co.*[6] were cited. In our view the material part of the evidence of D.W.1 was clearly hearsay evidence. His evidence was derived from interviews and not from his own knowledge. The learned Judge was perfectly right to hold that such evidence was hearsay. Objection should have been taken to the evidence of D.W.1. Hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier.

The authorities are clear on this. Perhaps, it is only necessary to cite *Sarkar*, Laws of Evidence, 13th Edition, page 51 which reads:—

"An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties..."

For reasons given we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Zainur & Maydien; Shearn Delamore & Co.*

R. SARASWATHY v. R. PALAKRISNAN

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C. JJ.) December 16, 1985 & January 18, 1986]

[Kuala Lumpur — Supreme Court Civil Appeal No. 68 of 1985]

Family Law — Application for custody and for maintenance of child — Application made under Law Reform (Marriage and Divorce) Act, 1976 — No pending action for divorce — Parties living separately — Whether application properly made — Guardianship of Infants Act, 1961 — Married Women and Children (Maintenance) Act, 1950 — Law Reform (Marriage and Divorce) Act, 1976, ss. 83(3) & 93(1).

Interpretation of Statutes — Long title.

This was an appeal from the decision of the High Court reported at [1985] 2 M.L.J. 458. The appellant had claimed custody of her infant son under section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 as well as maintenance for him under section 93(1) of the Act from the respondent, her husband. The parties had separated and the appellant and her son were living separately from the respondent in her parents' home. There was no pending action for divorce between the parties. The learned judge held that as there was no pending action for divorce neither section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 nor section 93(1) of the Act can be invoked. It was held that both on procedure and on the merits the application should be dismissed. The appellant appealed.

Held: (1) the three Acts (Law Reform (Marriage and Divorce) Act 1976, the Guardianship of Infants Act 1961 and the Married Women and Children (Maintenance) Act 1950) are all applicable depending on the circumstances of a particular case and in the state of affairs surrounding this appeal the application under section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 was properly made. There would be no need for the parties to wait, until perhaps the unlikely event of their commencing a divorce action before making such application;

(2) the appellant may therefore if she so desires proceed with the Originating Summons before another Judge of the High Court.

SUPREME COURT.

P.S. Ranjan (*Miss Bella Loo* with him) for the appellant.

G. Davidson for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the Judgment of the Court): The appellant/plaintiff sought the custody of her infant son as well as for maintenance from her husband, the respondent. The parties were married on November 30, 1974 at the Registry of Marriages, Kuala Lumpur and later underwent a Hindu marriage ceremony on September 6, 1975. Their only issue, the infant son and the subject matter of this appeal was born on February 6, 1979, which makes him just short of 7 years at the time of the hearing of this appeal. In December 1980 the appellant was forced to take him away from the matrimonial home to her parents' home following matrimonial problems she had with her husband. However in an effort to save her marriage she moved back to her matrimonial home together

with the infant in 1981. This effort proved to be of no avail and two years later, in December 1983 the appellant, with the consent of the respondent, moved to her parents' house, taking the infant son with her. Mother and child have been living there ever since.

Appellant makes this application under section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as the "Act"), seeking to take advantage of the rebuttable presumption under that section that custody of a child below the age of 7 years should go to the mother. The learned trial judge held that there was no pending action for divorce between the parties, and we quote "I do not consider that section 88(3) of the Act can be invoked. This is so as the preamble of the Act in part says that the Act is to amend and consolidate the laws relating to divorce; and to provide for matters incidental thereto."

The learned trial judge went on to say that that subsection can only be invoked if the custody application forms part of the ancillary relief sought by the appellant in a petition for divorce. She added that since the present application is not such an application, appellant cannot resort to the subsection.

The learned trial judge went on to say that since the marriage between the parties was still subsisting, the appellant should have made this application under section 5 of the Guardianship of Infants Act 1961 which, she noted, confers guardianship of the infant to the father with the mother having care and control of the infant. She also remarked that nowhere in the affidavit in support of the application had the appellant averred to any act of the respondent which indicated that the care and control of her son was being threatened. Neither did it allege that the respondent was a father unfit to retain custody of the infant son. Indeed, she noted that on the contrary the affidavit admits that the husband has visited the child from time to time. There was no reference to any adverse effect to the child, or any hint that the respondent had threatened to take the child away from the appellant's care and control. In consequence, the learned judge inferred from the foregoing that the husband had not abandoned custody of the infant altogether.

The judge then remarked that since the prayer for maintenance of the infant was also made under section 93(1) of the Act and for the same reasons already given, she ruled that the appellant cannot resort to this section, but held she should have made the application under section 3 of the Married Women and Children (Maintenance) Act 1950, in which case, she added, the appellant must show that the respondent neglected or refused to maintain the son. However there was no such allegation in her affidavit.

Therefore she added, "both on procedure and on the merits, I had dismissed this Originating Summons".

Mr. Ranjan for the appellant concedes that the only issue in this appeal is whether the Law Reform (Marriage and Divorce) Act 1976, in particular section 88 thereof applies, where the parties to the proceedings have not filed any petition for divorce, but are only separated.

We were referred to *Halsbury's* Laws of England 4th Edn. Vol. 44 page 491, where under the rubric of "Title" in paragraph 812 appears the following words:–

> "Every statute begins with a title, often referred to as its 'long title', consisting of the introductory phrase "An Act to", followed by words briefly describing its objects. It has not always been the practice for statutes to have titles, and even after the practice had become established, the title was for a long period without parliamentary significance. For a further period its parliamentary significance was very limited, and the result was that, for some centuries, the courts refused to regard titles either as forming a part of statutes or as relevant to their interpretation.
>
> However, as the importance attached to titles by Parliament increased, so the courts began to give greater weight to them, and today the title undoubtedly forms part of the statute, and may be looked at for the purpose of interpreting the statute as a whole and ascertaining its scope, although not for the purpose of contradicting the clear and unambiguous language of particular provisions".

At page 20 of the Record the learned trial judge said and we quote,

> "As there is no pending action for divorce between the parties, I do not consider that section 88(3) of the Act can be invoked. This is so as the preamble of the Act is to 'amend and consolidate the laws relating to divorce; and to provide for matters incidental thereto'. Thus jurisdiction under section 88(3) of the Act can only be invoked if this custody application forms part of the ancillary relief sought by the plaintiff in a petition for divorce between her and the defendant. As this is not so, she cannot therefore resort to section 88(3) of the Act.
>
> As the marriage between the parties is still subsisting, the plaintiff should have made this application under section 5 of the Guardianship of Infants Act 1961 which confers guardianship of an infant to the father with the mother having care and control of such infant".

In short, what the learned judge is saying is that the application in this Originating Summons is bad in law, having been made under an Act which cannot apply where there is no divorce petition between the parties, and having so found she should have dismissed the Originating Summons without more ado. However, instead of doing so what the learned judge did was to adopt a most unusual course. She held that the appellant should have made this application under section 5 of the Guardianship of Infants Act 61 which confers guardianship of an infant to the father with the mother having care and control of the infant. In fact she treated this Originating Summons as if it was an application made under the Guardianship of Infants Act 1961, and then after considering the evidence available, decided that the respondent's behaviour had in no way given the impression that he had abandoned the custody of his son altogether. The only reasonable inference is that even if the application had been made under that section she would have declined to exercise her discretion in favour of the appellant.

With respect we think that what did she was to give a judgment in the alternative. It may well be that in an action for damages, the judge having held that the defendant is not liable may then proceed to set out, in the event of a successful appeal against that decision, an assessment of the damages which she would have awarded if the plaintiff had been successful.

However, in the context of the present appeal, the learned judge is not free to hold in the first place that she had no jurisdiction under the Law Reform (Marriage and Divorce) Act 1976 and then proceed to consider the application in the light of other laws not relied upon by the plaintiff/appellant. Such a judgment in the alternative would be wrong indeed. Having held that she had no jurisdiction she would have dismissed the Originating Summons then and there after which, of course, the Supreme Court could give proper directions in the event of a successful appeal.

We hold that the three Acts (Law Reform (Marriage and Divorce) Act 1976, the Guardianship of Infants Act 1961 and the Married Women and Children (Maintenance) Act 1950) are all applicable depending on the circumstances of a particular case and that in the state of affairs surrounding this appeal the application under section 88(3) was properly made. There would be no need for the parties to wait, until perhaps the unlikely event of their commencing a divorce action before making such application. For this reason we allow this appeal.

The next step presents some difficulty. It will be inappropriate for us to remit this Originating Summons back to the same judge for a rehearing because of the view she held on the facts in the alternative judgment.

Therefore we would order that, if the appellant so desires, she may proceed with the Originating Summons before another judge of the High Court.

Costs here and below to the appellant. Deposit to be refunded to the appellant.

Appeal allowed.

Solicitors: *Ng Ek Teong & Partners; Syarikat Davidson.*

SYARIKAT JOO SENG & ANOR. v. HABIB BANK LTD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) February 5, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 141 of 1985]

Practice and Procedure – Judgment in default of appearance – Claim based on deceit or conspiracy to defraud – Leave to be obtained to enter judgment – Irregular judgment – Party entitled ex debito justitiae to have judgment set aside – R.H.C. 1980 O. 2 r. 1 & O. 19 rr. 7 & 9 – R.S.C. 1980, r. 57 – Courts of Judicature Act, 1964, s. 44(1).

In this case the respondents had taken out a writ against the appellants claiming a declaration (a) that the first appellant had received money as money had and received to the use of the respondents and ordering the first appellant to repay the amount; (b) that the second appellant received money as money had and received to the use of the respondents and ordering the first appellant to repay the amount. The appellants entered a conditional appearance and applied to strike out both the writ and the statement of claim. The application was dismissed on June 4, 1984 and notice of appeal was filed on June 29, 1984. However on June 22, 1984 the respondents without obtaining leave of the court or a judge entered a judgment in default of defence against the appellants. The appellants applied to set aside the default judgment and this was refused in the High Court. The appellants appealed.